



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Ulster Scots/Ulster British
Provisions of the
Northern Ireland Act 1998
(Amendment No 3)**

May 2020

Table of Contents

Summary of Recommendations	3
1.0 Introduction.....	7
2.0 General Comments on the Bill	9
Ulster Scots as a national minority	9
Ulster British tradition.....	11
3.0 Purpose of the Bill	13
Clause 78O - Purpose of the Bill.....	13
4.0 Functions of the Commissioner	14
Clause 78Q – General functions of the Commissioner	14
Clause 78Q(3)(a) – Awareness-raising function	15
Clause 78Q(3)(b) – Advisory function	15
Clause 78Q(3)(c) – Advisory function on human rights treaties.....	17
Clause 78Q(5) – Investigatory and reporting function.....	18
5.0 Independence and accountability	22
Clause 78Q(6) – Relationship with Ministers	22
6.0 Education Duties	23
Clause 78R - Duty on Department of Education	23
7.0 Public Authority	24
Appendix 1 – right to enjoy culture	26
UN International Covenant on Civil and Political Rights	26
UN International Covenant on Economic, Social and Cultural Rights ...	26

Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.4** welcomes the establishment of the Commissioner. This is a positive measure that will help realise duties to promote and protect the Ulster Scots language and culture.
- 2.9** notes the decision to recognise Ulster Scots as a national minority and recommends that this is completed by the UK Government in advance or concurrently with the passage of the Bill.
- 2.10** advises that the Bill make reference to the designation of Ulster Scots as a national minority within the UK.
- 2.11** recommends that designation as a member of the Ulster Scots community be premised on the principle of self-identification and guaranteed within the Bill.
- 2.18** advises that the Office of Identity and Cultural Expression may be the more appropriate body to develop work associated with the concept of Ulster British. It recommends that this aspect of the Commissioner's remit is given further consideration in consultation with representatives of the Ulster Scots community.
- 3.4** recommends that clause 78O(2) includes an additional purpose that the Bill aims to promote and protect the language, arts and literature associated with the Ulster Scots tradition in Northern Ireland.
- 4.3** recommends that the primary role of the Commissioner in clause 78Q is amended to cover both 'enhance and develop' and 'promote and protect'. This language would ensure the Commissioner's remit is consistent with the human rights framework and those standards referenced within the Bill.

- 4.7 recommends that, within clause 78Q(3)(a), the Commissioner’s awareness-raising function should be enhanced to include promoting Ulster Scots within wider society. This function should be developed in consultation with Boord o Ulstér-Scotch (Ulster Scots Agency).**
- 4.12 recommends that the effectiveness of Commissioner is enhanced by requiring that public authorities have regard to their advice.**
- 4.15 welcomes the broad mandate of the Commissioner within clause 78Q(3)(b), which includes art and literature as well as language. The NIHRC recommends that other aspects of Ulster-Scots culture including heritage, religion, history, music, dance are also effectively protected by including them within the Commissioner’s mandate.**
- 4.16 advises that the Boord o Ulstér-Scotch (Ulster Scots Agency) is consulted on how the mandate of the Commissioner within clause 78Q(3)(b) is amended, to ensure that the Commissioner’s remit is comprehensive.**
- 4.19 recommends that the list of relevant treaties in clause 78Q(3)(c) is expanded to include Article 27 UN ICCPR and Article 15 UN ICESCR.**
- 4.20 recommends that clause 78Q(3)(c) is amended to explicitly require the Commissioner to promote and protect human rights standards in their own work.**
- 4.21 advises that the correct name of the treaty contained in clause 78Q(3)(c)(i) is ‘Council of Europe’s Charter for Regional or Minority Languages’.**
- 4.23 recommends that the Commissioner is required to consult with and take account of advice provided by the NIHRC in respect of clause 78Q(3)(c).**

- 4.26 recommends that the same wording is used for laying an investigation report before the NI Assembly in clause 78Q(5)(b) of Amendment No 3 and clause 78L(5)(b) of Amendment No 2.**
- 4.33 advises that clause 78Q(5) could be strengthened to ensure that public authorities take seriously the findings and recommendations of an investigation conducted by the Commissioner. This could be by making it clearer that the Commissioner has the option to report non-compliance to the Northern Ireland Assembly, mirroring the provisions of the Official Languages Act 2003. Or it could be adopting the stronger approach in Welsh Language Act 1993 and enabling a Minister to make enforceable directions on the basis of the Commissioner's report.**
- 4.34 advises that consideration should be given to inserting specific remedial provisions within the Bill, such as making statutory provision for compensation as is the case in Ireland, or providing the Commissioner with powers to support an individual to take legal action or intervene in cases, similar to the situation in Wales.**
- 4.36 recommends that the Commissioner's complaints function set out in clause 78Q(5) is widened to reflect the full mandate of this new office.**
- 4.39 recommends that the clause 78Q(5) is amended to include safeguards to ensure that the Commissioner's investigation function cannot be exercised unreasonably. An example of this approach is provided in Wales.**
- 4.42 recommends that the Commissioner is afforded the power to initiate 'own motion' investigations.**
- 4.44 recommends that provision is included for the Commissioner to compel evidence in exercising its investigatory powers.**

- 5.4** advises that further consideration is given to how to ensure the independence of the Commissioner. This could involve expressly stating that the Commissioner shall be independent, as in the Official Languages Act 2003. Alternatively, a balance can be struck by ensuring any government direction to the Commissioner takes into account the Commissioner's own advice, as is the case in Wales or by amending the Bill to ensure that Ministerial directions are reasonable, have a legitimate aim and are proportionate.
- 6.4** advises that the Bill clarifies the scope of the duty on the Department of Education and recommends that the duty is extended to the full mandate of the Commissioner, not only language.
- 6.6** recommends that the Department for Economy is subject to a similar duty, as set out in clause 78R, given its remit in the provision of Further and Higher Education.
- 7.3** advises that the interpretation of 'public authority' within clause 78S is too narrow and advises that the definition of 'public authorities' should be amended to reflect section 6 of the Human Rights Act 1998. In addition, a wider definition must be provided to ensure compliance with European Charter for Regional and Minority Languages reference within the Bill itself.

1.0 Introduction

1.1. The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights. In accordance with this function the following advice is submitted to the Executive Office on the Ulster Scots/Ulster British provisions contained in the Northern Ireland Act 1998 (Amendment No 3).

1.2. The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe and United Nations systems.¹ The relevant international treaties in this context include:

- European Convention on Human Rights 1950 (ECHR);²
- United Nations (UN) International Covenant on Civil and Political Rights 1966 (UN ICCPR);³
- UN International Covenant on Economic, Social and Cultural Rights 1966 (UN ICESCR);⁴
- UN Convention on the Rights of the Child 1989 (UN CRC);⁵
- European Charter for Regional or Minority Languages 1992;⁶
- Framework Convention for the Protection of National Minorities 1993;⁷
- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).⁸

1.3. In addition to these treaty standards, there exists a body of 'soft law' developed by various human rights bodies. These declarations

¹ The NI Executive is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) government's ratification. In addition, the NI Act 1998, section 26(1) provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or NI department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall be taken". The NIHRC further recalls that the NI Act 1998, section 24(1)(a) states that "a Minister or NI department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the Convention rights".

² Ratified by the UK in 1951.

³ Ratified by the UK in 1976.

⁴ Ratified by the UK in 1976.

⁵ Ratified by the UK in 1991.

⁶ Ratified by the UK in 2001.

⁷ Ratified by the UK in 1998.

⁸ Ratified by the UK in 2009.

and principles are non-binding but provide further guidance in respect of specific topic areas. The relevant standards in this context include:

- UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities 1992;⁹
- Vienna Declaration on Human Rights 1993;¹⁰
- Organisation for Security and Cooperation in Europe's Hague Recommendations Regarding the Education Rights of National Minorities 1996;¹¹
- Organisation for Security and Cooperation in Europe's Oslo Recommendations Regarding the Linguistic Rights of National Minorities 1998;¹²
- UN Education Scientific and Cultural Organisation's Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005;¹³
- Organisation for Security and Cooperation in Europe's Ljubljana Guidelines on Integration of Diverse Societies 2012.¹⁴

1.4 The NIHRC welcomes the opportunity to provide advice on this Bill. Overall, the NIHRC recognises that the policy objectives underpinning the proposed legislation are progressive. However, the NIHRC makes a number of recommendations to enhance the protection of, and to ensure compliance, with human rights standards.

1.5 The Bill does not give the proposed Commissioner a name or a title. Throughout this document, the NIHRC refers to the 'Commissioner'.

⁹ A/RES/47/135, 'UN General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', 3 February 1992.

¹⁰ A/CONF.157/23, 'Vienna Declaration and Programme of Action', 12 July 1993.

¹¹ Organisation for Security and Cooperation in Europe, 'The Hague Recommendations Regarding the Education Rights of National Minorities' (OSCE, 1996).

¹² Organisation for Security and Cooperation in Europe, 'The Oslo Recommendations Regarding the Linguistic Rights of National Minorities' (OSCE, 1998).

¹³ Ratified by the UK in 2007.

¹⁴ Organisation for Security and Cooperation in Europe, 'The Ljubljana Guidelines on Integration of Diverse Societies' (OSCE, 2012).

2.0 General Comments on the Bill

- 2.1 The Northern Ireland Act 1998 (Amendment No 3) contains two main provisions. First, it establishes a Commissioner in relation to Ulster Scots/Ulster British and details the functions, powers and status of this new public office.¹⁵ Second, it places a new duty on the Department of Education in relation to Ulster Scots.¹⁶
- 2.2 International human rights standards are clear that positive obligations are necessary to ensure that minority cultures and languages are fully realised.¹⁷
- 2.3 Prior to the New Decade, New Approach deal, domestic commitments towards enhancing and developing the Ulster Scots language, heritage and culture had been established within the Belfast (Good Friday) Agreement 1998,¹⁸ the St Andrew's Agreement 2006¹⁹ and through an amendment to section 28D(2) of the Northern Ireland Act 1998.²⁰
- 2.4 **The NIHRC welcomes the establishment of the Commissioner. This is a positive measure that will help realise duties to promote and protect the Ulster Scots language and culture.**

Ulster Scots as a national minority

- 2.5 In New Decade New Approach, the UK Government states that it will recognise Ulster Scots as a national minority under the Framework Convention for the Protection of National Minorities.²¹ This commitment is not found in the Bill, however, addressing the issue is relevant to the Bill.

¹⁵ Clauses 78O-78Q, Northern Ireland Act 1998 (Amendment No 3).

¹⁶ Clauses 78R, Northern Ireland Act 1998 (Amendment No 3).

¹⁷ CCPR/C/21/Rev.1/Add.5, 'Human Rights Committee General Comment No 23: The Rights of Minorities', 8 April 1994, at para 1; Article 6(2)(b), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005.

¹⁸ The Belfast (Good Friday) Agreement recognises "the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland the Irish language, Ulster Scots and the languages of various ethnic communities, all of which are part of the cultural wealth of the island of Ireland". See Belfast (Good Friday) Agreement 1998; Rights, Safeguards and Equality of Opportunity, at para 3.

¹⁹ The St Andrew's Agreement 2006 reiterates that "the [UK] Government firmly believes in the need to enhance and develop the Ulster Scots language, heritage and culture and will support the incoming Executive in taking this forward". See St. Andrews Agreement, 2006, at Annex B.

²⁰ As amended by section 15, Northern Ireland (St. Andrews (Agreement) Act 2006).

²¹ NI Office, 'New Decade New Approach, Annex A' (NIO, 2020), at para 24.

- 2.6 'National minority' is not a legally defined term within the UK (nor is it defined within the Framework Convention for the Protection of National Minorities).²² For the purpose of reporting under the Framework Convention, the UK's interpretation is based on the definition of 'racial group' in the Race Relations Act 1976. Hence, in its first State Report on the Framework Convention, the UK referred to "our ethnic minority communities (or visible minorities) and the Scots, Irish and Welsh".²³ Gypsies and Travellers are also included.²⁴ In April 2014, the UK agreed to bring Cornish within the scope of the Framework Convention.²⁵
- 2.7 While Ulster Scots is not currently recognised as a national minority by the UK,²⁶ it is recognised as a linguistic minority under the Framework Convention for the Protection of National Minorities.²⁷ As such, the broad provisions of the Framework Convention apply including a duty on States Parties to "encourage a spirit of tolerance and intercultural dialogue".²⁸ If Ulster Scots were recognised as a national minority, then more specific duties would apply. This would include measures such as facilitating access to the media²⁹ and ensuring equal opportunities.³⁰
- 2.8 With regard to being recognised as a national minority, the Advisory Committee on the Framework Convention for the Protection of National Minorities recommends that the principle of free self-identification is of "paramount importance".³¹ Article 3(1) of the

²² The Explanatory report to the Framework Convention for the Protection of National Minorities states "it should also be pointed out that the framework Convention contains no definition of the notion of 'national minority'. It was decided to adopt a pragmatic approach, based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States". See Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report' (CoE, 1995), at para 12.

²³ The report notes that the Scots, Irish and Welsh are defined as a racial group by virtue of their national origins. See ACFC/SR(1999)013, 'Report submitted by the United Kingdom on the Framework Convention for the Protection of National Minorities', 26 July 1999, at para 3.

²⁴ ACFC/SR(1999)013, 'Report submitted by the United Kingdom on the Framework Convention for the Protection of National Minorities', 26 July 1999, at para 3.

²⁵ ACFC/SR/IV(2015)004 rev, 'Fourth Report Submitted by the United Kingdom on the Framework Convention for the Protection of National Minorities', 26 March 2015, at para 1.

²⁶ ACFC/INF/OP/I(2002)006, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Opinion on the United Kingdom' (CoE, 2001), at para 14.

²⁷ ACFC/OP/IV(2016)005, 'Advisory Committee on the Framework Convention on National Minorities Fourth Opinion on the United Kingdom', 27 February 2017, at para 103.

²⁸ Article 6, Framework Convention on National Minorities 1998.

²⁹ Article 9, Framework Convention on National Minorities 1998.

³⁰ ACFC/44DOC(2012)001 rev, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Thematic Commentary No 3', 5 July 2012, at para 2.

³¹ Ibid, at para 16.

Framework Convention guarantees that every person belonging to a national minority “shall have the right freely to choose to be treated or not to be treated as such”. Further, Article 3(1) of the Framework Convention confirms that “no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice”. The Framework Convention emphasises that “affiliation with a minority group is a matter of personal choice”.³² The “principle of self-identification also guarantees the possibility of multiple affiliation”, which can arise due to mixed marriages or due to other situations.³³

- 2.9 **The NIHRC notes the decision to recognise Ulster Scots as a national minority and recommends that this is completed by the UK Government in advance or concurrently with the passage of the Bill.**
- 2.10 **The NIHRC advises that the Bill make reference to the designation of Ulster Scots as a national minority within the UK.**
- 2.11 **The NIHRC recommends that designation as a member of the Ulster Scots community be premised on the principle of self-identification and guaranteed within the Bill.**

Ulster British tradition

- 2.12 The long title of the Bill incorporates the concept of Ulster Britishness by stating it is:

a Bill to amend the Northern Ireland Act 1998 to insert provisions for a Commissioner to enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland; and for connected purposes.

- 2.13 Ulster Scots is currently recognised as a linguistic minority by the Framework Convention for the Protection of National Minorities and as a regional or minority language by the European Charter for

³² Council of Europe, ‘Framework Convention for the Protection of National Minorities and Explanatory Report’ (CoE, 1995), at para 35.

³³ ACFC/44DOC(2012)001 rev, ‘Advisory Committee on the Framework Convention for the Protection of National Minorities Thematic Commentary No 3’, 5 July 2012, at para 18.

Regional or Minority Languages and the UK Government has committed to extend this recognition as a national minority.³⁴ However, 'Ulster British' is not a term or a linguistic/national minority group presently recognised by human rights treaty bodies. It appears that Ulster Scots culture is at risk of being conflated with a distinct political identity. This may have unintended consequences.

- 2.14 While the use of the Ulster Scots language may be commonly associated with the Unionist/Protestant community, the Boord o Ulstér-Scotch (Ulster Scots Agency) emphasises that the "Ulster-Scots language is spoken in different areas of Ireland by both Protestants and Roman Catholics alike".³⁵ The Ulster-Scots Language Society highlights that its constitution stipulates that it is "non-political and non-sectarian".³⁶
- 2.15 The NIHRC notes that it should not be assumed that all Ulster Scots speakers may associate with Ulster Britishness. Indeed, the Advisory Committee on the Framework Convention for the Protection of National Minorities cautions that "while language is generally perceived as an essential marker of identity, language competence or lack thereof, as well as the mere use of a language, must not automatically be linked to affiliation with a particular group".³⁷
- 2.16 Binding the established Ulster Scots community recognised in international law with a concept of Ulster British in a single mandate could undermine developments in respect of Ulster Scots language and culture.
- 2.17 The Northern Ireland Act (Amendment No 1) establishes the Office of Identity and Cultural Expression. The office aims to promote

³⁴ ACFC/OP/IV(2016)005, 'Advisory Committee on the Framework Convention on National Minorities Fourth Opinion on the United Kingdom', 27 February 2017, at para 103; Council of Europe, 'Reservations and Declarations for Treaty No. 148 – ECRML'. Available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148/declarations?p_auth=adpW1NPI

³⁵ The Ulster-Scots language is spoken principally in the "Ards peninsula, north Down, Co Antrim, and north Co Londonderry and in east Donegal (the Laggan)". See Boord o Ulstér-Scotch (Ulster Scots Agency), 'An Introduction to the Ulster Scots language'. Available at: <https://www.ulsterscotsagency.com/what-is-ulster-scots/language/>

³⁶ Ulster-Scots Language Society, 'Home Page'. Available at: <http://www.ulsterscotslanguage.com/>

³⁷ ACFC/44DOC(2012)001 rev, 'Advisory Committee on the Framework Convention for the Protection of National Minorities Thematic Commentary No 3', 5 July 2012, at para 16.

cultural pluralism and respect for diversity, build social cohesion and reconciliation and to celebrate and support all aspects of cultural and linguistic heritage. The Commission notes that clause 78C of that Bill refers to the present Bill and the role of the Commissioner; however, there is no reference in the present Bill to the Northern Ireland Act (Amendment No 1).

- 2.18 The NIHRC advises that the Office of Identity and Cultural Expression may be the more appropriate body to develop work associated with the concept of Ulster British. It recommends that this aspect of the Commissioner's remit is given further consideration in consultation with representatives of the Ulster Scots community.**

3.0 Purpose of the Bill

Clause 780 - Purpose of the Bill

- 3.1 Clause 780 sets out the purpose of the Bill as making provision for the appointment and functions of a Commissioner and to place a duty on the Department of Education as regards Ulster Scots. This clause does not make clear that the purpose of the Bill and the introduction of the associated Commissioner is to promote and protect the language, arts and literature associated with the Ulster Scots tradition in Northern Ireland.
- 3.2 The recognition of Ulster Scots as a national minority carries with it obligations beyond language. The Framework Convention on National Minorities requires States to promote the conditions necessary for persons belonging to national minorities to "maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage".³⁸ As per the UN ICESCR Committee, culture is a "broad, inclusive concept"³⁹ and is not limited to language. This broad concept should be reflected in the purpose of the Bill.

³⁸ Article 5, Framework Convention on National Minorities 1998.

³⁹ E/C.12/GC/21, 'UN Committee on Economic, Social and Cultural Rights General Comment No 21: Right of Everyone to Take Part in Cultural Life', 21 December 2009, at para 11.

3.3 Article 14(2) of the European Charter for Regional or Minority Languages specifies that the provisions of the Charter “shall be implemented without prejudice to the learning of the official language or the teaching in this language”. Clause 78O(2) specifically provides for this by stating that “nothing in this Part affects the status of the English language”.

3.4 **The NIHRC recommends that clause 78O(2) includes an additional purpose that the Bill aims to promote and protect the language, arts and literature associated with the Ulster Scots tradition in Northern Ireland.**

4.0 Functions of the Commissioner

Clause 78Q – General functions of the Commissioner

4.1 Clause 78Q states the main function of the Commissioner is to “enhance and develop the language, arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland”.⁴⁰

4.2 International human rights standards use the terms ‘promote and protect’. For example, the Vienna Declaration 1993 states that “the promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles”.⁴¹ Human rights bodies have consistently reaffirmed the ‘promote and protect’ principles.⁴²

4.3 **The NIHRC recommends that the primary role of the Commissioner in clause 78Q is amended to cover both ‘enhance and develop’ and ‘promote and protect’. This language would ensure the Commissioner’s remit is**

⁴⁰ Northern Ireland Act 1998 (Amendment No 3).

⁴¹ A/CONF.157/23, ‘Vienna Declaration and Programme of Action’, 12 July 1993, at para 4.

⁴² See UN Human Rights Committee, ‘Civil and Political Rights: Fact sheet No 15 (Rev.1)’ (undated); GA Res 53/144, ‘UN General Assembly Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms’, 9 December 1998, Article 2; A/60/L.1, ‘UN General Assembly World Summit Outcome 2005’, 16 September 2005, at para 12.

consistent with the human rights framework and those standards referenced within the Bill.

Clause 78Q(3)(a) – Awareness-raising function

- 4.4 Clause 78Q(3)(a) requires the Commissioner to increase awareness and visibility of Ulster Scots services provided by public authorities in NI. Clause 78Q(4)(b) defines 'Ulster Scots services' as meaning "services which are provided in Ulster Scots or are otherwise likely to be of particular interest to those who have an interest in the relevant language, arts and literature".
- 4.5 The awareness-raising function could go further than currently drafted. In addition to highlighting existing services, which are directed at members of the Ulster Scots community, the Commissioner could have an active role in promoting its Ulster Scots within wider society.
- 4.6 Taking language as an example, the European Charter for Regional or Minority Languages encourages States to celebrate regional or minority languages as "expressions of cultural wealth".⁴³ The UN Human Rights Committee similarly highlights that the "fabric of society as a whole" is enriched by minority languages.⁴⁴
- 4.7 The NIHRC recommends that, within clause 78Q(3)(a), the Commissioner's awareness-raising function should be enhanced to include promoting Ulster Scots within wider society. This function should be developed in consultation with Boord o Ulstér-Scotch (Ulster Scots Agency).**

Clause 78Q(3)(b) – Advisory function

- 4.8 Clause 78Q(3)(b) requires the Commissioner to provide advice and guidance to public authorities on enhancing and developing the relevant languages, arts and literature.

⁴³ Article 7(1)(a), European Charter on Regional or Minority Languages 1992.

⁴⁴ CCPR/C/21/Rev.1/Add.5, 'UN Human Rights Committee General Comment No 23: The Rights of Minorities', 8 April 1994, at para 9.

- 4.9 There is no corresponding duty on public authorities to have any regard to the guidance produced by the Commissioner. In contrast, under clause 78L of the corresponding Northern Ireland Act (Amendment No 2), public authorities are required in statute to have “due regard” to the best practice standards provided by the Irish Language Commissioner.
- 4.10 This approach echoes the Official Languages Act 2003, which in section 13(2)(a), requires that public authorities “shall have regard” to any Irish language guidelines issued. It also echoes the approach of the Welsh Language Act 1993, which in sections 5(3) and 21 requires that public authorities and a person acting on behalf of the Crown “shall have regard to any guidelines issued by the [*Comisiynydd y Gymraeg* Welsh Language Commissioner]” in preparing schemes. Under section 4(3) of the Welsh Language (Wales) Measure 2011, recommendations, representations or advice provided by the Commissioner in writing to Welsh Ministers must be given “due regard”.
- 4.11 Human rights standards emphasise that rights must be “practical and effective, as opposed to theoretical or illusory”.⁴⁵ Mechanisms designed to promote and protect human rights must be effective.⁴⁶ Therefore, for the Commissioner’s advisory function to be meaningful, public authorities must be required to have regard to that advice.

4.12 The NIHRC recommends that the effectiveness of Commissioner is enhanced by requiring that public authorities have regard to their advice.

- 4.13 The Commissioner’s advice function in clause 78Q(3)(b) is not limited to language, but instead extends to advising on the enhancement and development of the arts and literature associated with the Ulster Scots and Ulster British tradition in Northern Ireland. It is noted, however, that the current Ulster-Scots Strategy acknowledges that the diversity of Ulster-Scots culture extends

⁴⁵ This principle has been constantly reaffirmed since the case of *Airey v. Ireland*, App. No. 6289/73, 9 October 1979, paragraph 24. See Directorate General Human Rights and Rule of Law, ‘Guide to good practice in respect of domestic remedies’ (CoE, 2013), at 31.

⁴⁶ Article 2(2), ICCPR requires each State Party to “undertake the necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant”.

further and includes “literature, language, visual arts, history, built history, music and dance”.⁴⁷ Through dialogue with the Boord o Ulstér-Scotch (Ulster Scots Agency) it was also highlighted that Ulster-Scots culture also incorporates religion and heritage.⁴⁸

4.14 As outlined above, the UN ICESCR Committee advises that culture is a “broad, inclusive concept encompassing all manifestations of human existence”.⁴⁹ This includes language, literature, music and song, religions, and sport and games.⁵⁰

4.15 The NIHRC welcomes the broad mandate of the Commissioner within clause 78Q(3)(b), which includes art and literature as well as language. The NIHRC recommends that other aspects of Ulster-Scots culture including heritage, religion, history, music, dance are also effectively protected by including them within the Commissioner’s mandate.

4.16 The NIHRC advises that the Boord o Ulstér-Scotch (Ulster Scots Agency) is consulted on how the mandate of the Commissioner within clause 78Q(3)(b) is amended, to ensure that the Commissioner’s remit is comprehensive.

Clause 78Q(3)(c) – Advisory function on human rights treaties

4.17 Under clause 78Q(3)(c), the Commissioner is required to:

provide advice and guidance to public authorities on the effect and implementation so far as affecting the relevant language, arts and literature of:

- i) the Council of Europe’s Charter for Regional and Minority Languages dated 5th November 1992;
- ii) the Council of Europe’s Framework Convention for the Protection of National Minorities dated 1st February 1995;

⁴⁷ Department of Culture, Arts and Leisure, ‘Strategy to enhance and develop the Ulster Scots Language, Heritage and Culture 2015-2035’, (DCAL, 2015), at para 4.40.

⁴⁸ Meeting between NI Human Rights Commission and Boord o Ulstér-Scotch (Ulster Scots Agency), 27 February 2020.

⁴⁹ E/C.12/GC/21, ‘UN Committee on Economic, Social and Cultural Rights General Comment No 21: Right of Everyone to Take Part in Cultural Life’, 21 December 2009, at para 11.

⁵⁰ Ibid, at para 13.

iii) the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989.

4.18 The NIHRC welcomes the reference to three human rights treaties, whereby the Commissioner must provide advice and guidance to public authorities on their effect and implementation. Omitted from this list, however, are the international covenants UN ICCPR and UN ICESCR. These treaties are central in the protection of culture at Articles 27 and 15 respectively and are included in Appendix 1. There is also no requirement on the Commissioner to promote and protect human rights in their own work.

4.19 The NIHRC recommends that the list of relevant treaties in clause 78Q(3)(c) is expanded to include Article 27 UN ICCPR and Article 15 UN ICESCR.

4.20 The NIHRC recommends that clause 78Q(3)(c) is amended to explicitly require the Commissioner to promote and protect human rights standards in their own work.

4.21 The NIHRC advises that the correct name of the treaty contained in clause 78Q(3)(c)(i) is 'Council of Europe's Charter for Regional or Minority Languages'.

4.22 Both the Commissioner, under clause 78Q(3)(c), and the NIHRC, under section 69 of the Northern Ireland Act 1998, have statutory advice functions with respect to human rights treaties. The Commission is the established National Human Rights Institution within Northern Ireland, operating in full accordance with the UN Paris Principles. As such, the NIHRC has a recognised mandate to advise on human rights compliance and engage with the relevant international treaty bodies and the UN Human Rights Council.

4.23 The NIHRC recommends that the Commissioner is required to consult with and take account of advice provided by the NIHRC in respect of clause 78Q(3)(c).

Clause 78Q(5) – Investigatory and reporting function

4.24 Clause 78Q(5)(a) provides that the Commissioner must “investigate a complaint made by a member of the public about the failure of a public authority to have due regard to any of the advice provided to it by the Commissioner in respect of language”.

4.25 Having completed an investigation report, clause 78Q(5)(b) states that the Commissioner “may lay a report on the investigation before the [NI] Assembly”. In contrast, under clause 78L(5)(b) of the corresponding Northern Ireland Act (Amendment No 2), the Irish Language Commissioner “shall lay the” investigation report before the NI Assembly.

4.26 The NIHRC recommends that the same wording is used for laying an investigation report before the NI Assembly in clause 78Q(5)(b) of Amendment No 3 and clause 78L(5)(b) of Amendment No 2.

4.27 The NIHRC welcomes the duty within clause 78Q(5) that enables the Commissioner to receive and investigate complaints as a complement to existing legal remedies. However, the NIHRC has a number of reservations about whether the Commissioner has the necessary powers to ensure these duties are properly fulfilled.

4.28 Article 2(3)(a) of the UN ICCPR requires that States ensure that persons whose rights are violated have access to an effective remedy. The UN ICCPR is not prescriptive about the form the remedy should take. However, the UN Human Rights Committee has stated that allegations need to be investigated “promptly, thoroughly and effectively” by independent and impartial bodies. Further, remedies must be appropriately adapted so as to take account of the special vulnerability of certain categories of person. The Organisation for Security and Cooperation in Europe’s Oslo Recommendations state that availability of administrative remedies should not replace judicial recourses.

4.29 Clause 78Q(5) requires the Commissioner to investigate complaints about the failures of public authorities to have due regard to their advice. The Commissioner may also provide this report to the Northern Ireland Assembly. Yet, there is no requirement within the Bill for the public authorities being investigated to amend their

policies and practices in line with the findings and recommendations of an investigation conducted by the Commissioner.

- 4.30 Regarding investigations, section 19 of the Welsh Language Act 1993 requires that the *Comisiynydd y Gymraeg* provides a report of an investigation it undertakes to the public authority concerned, the Secretary of State and, if relevant, the complainant. The report may be published and can include recommendations for the public authority concerned. A similar approach is provided for within section 26 of the Official Languages Act 2003.
- 4.31 If the public authority does not action all of the recommendations, section 20 of the Welsh Language Act enables the *Comisiynydd y Gymraeg* to refer the matter to the Secretary of State, who can then make enforceable directions to the public authority concerned. In Ireland, sections 26(5) and 26(6) of the Official Languages Act 2003 provide that, in the situation where a public authority has not implemented “any recommendations” contained in the investigation report, the *An Coimisinéir Te anga* can make a report highlighting this issue and public authorities’ responses to the Houses of the Oireachtas.
- 4.32 Furthermore, under sections 27 and 28 of the Official Languages Act 2003, an individual has the ability to apply for compensation or appeal to the High Court on the basis of the *An Coimisinéir Te anga*’s findings. In Wales, under section 8 of the Welsh Language (Wales) Measure 2011, the *Comisiynydd y Gymraeg* can institute or intervene in a legal case linked to its functions. No similar provisions are made in this present Bill.
- 4.33 The NIHRC advises that clause 78Q(5) could be strengthened to ensure that public authorities take seriously the findings and recommendations of an investigation conducted by the Commissioner. This could be by making it clearer that the Commissioner has the option to report non-compliance to the Northern Ireland Assembly, mirroring the provisions of the Official Languages Act 2003. Or it could be adopting the stronger approach in Welsh Language Act 1993 and enabling a Minister to make enforceable directions on the basis of the Commissioner’s report.**

4.34 The NIHRC advises that consideration should be given to inserting specific remedial provisions within the Bill, such as making statutory provision for compensation as is the case in Ireland, or providing the Commissioner with powers to support an individual to take legal action or intervene in cases, similar to the situation in Wales.

4.35 The Commissioner's complaint remit under clause 78Q(5) applies only in respect of language; no power exists for the Commissioner to receive a complaint in respect of their full mandate.

4.36 The NIHRC recommends that the Commissioner's complaints function set out in clause 78Q(5) is widened to reflect the full mandate of this new office.

4.37 Concerns have been raised with the NIHRC that there are no safeguards contained within the Bill to ensure that the investigation function of the Commissioner and the Commissioner is not used unreasonably.

4.38 The Welsh legislation is crafted in a way to ensure that the powers of the *Comisiynydd y Gymraeg* cannot be used where "unreasonable or disproportionate".⁵¹

4.39 The NIHRC recommends that the clause 78Q(5) is amended to include safeguards to ensure that the Commissioner's investigation function cannot be exercised unreasonably. An example of this approach is provided in Wales.

4.40 While clause 78Q(5)(a) includes a power to investigate complaints, the Commissioner does not have the power to undertake own motion investigations.

4.41 Section 7(1) of the Welsh Language (Wales) Measures 2011, provides that the *Comisiynydd y Gymraeg* "may conduct an inquiry into any matter relating to any of the Commissioner's functions". Section 61 of the 2011 Measures also permits the Commissioner in

⁵¹ Sections 42, 43, 44,45, 55, 56, 57, 58, 60, 63, 95, Welsh Language (Wales) Measures 2011.

Wales to conduct investigations into non-compliance with standards. Section 21(b) of the Official Languages Act 2003 enables the Commissioner to “take all necessary measures within his or her authority to ensure compliance by public bodies with the provisions of this Act” and section 23 makes it clear that this includes conducting investigations.

4.42 The NIHRC recommends that the Commissioner is afforded the power to initiate ‘own motion’ investigations.

4.43 The Commissioner does not have the power within the Bill to compel evidence in exercising its investigatory function.

4.44 The NIHRC recommends that provision is included for the Commissioner to compel evidence in exercising its investigatory powers.

5.0 Independence and accountability

Clause 78Q(6) – Relationship with Ministers

5.1 Under clause 78Q(6), the Commissioner must “comply with any directions (of a general or specific nature) given by the Ministers as to the exercise of the Commissioner’s functions”. This provision subjects the Commissioner to more government control than the respective language commissioners in Wales and Ireland.

5.2 Section 16 of the Welsh Language (Wales) Measure 2011 states that Welsh Ministers “may give directions” to the *Comisiynydd y Gymraeg* except in the context of compliance notices, enforcement of standards and freedom to use Welsh. It is clear that the *Comisiynydd y Gymraeg* “must comply” with these directions. However, it is balanced by section 4(1), which states that “the Commissioner may do anything that he or she thinks appropriate”, and section 4(3) which requires Welsh Ministers to have “due regard” for written correspondence from the Commissioner. Section 20(2) of the Official Languages Act 2003 expressly states that the *An Coimisinéir Teanga* (Irish language) Commissioner “shall be independent in the performance of his or her functions”. There is no

express requirement on the *An Coimisinéir Te anga* to comply with Ministerial directions.

- 5.3 As the legislation is currently drafted, it is unclear what checks and balances are in place to ensure decisions by government bodies concerning the Commissioner are not unduly interfering with the office's independence. Independence is of particular importance with regards to the Commissioner's investigatory functions. To be an effective investigation, the persons responsible for it must be independent.⁵² Amending the Bill to ensure that any directions issued by Ministers are reasonable, have a legitimate aim and are proportionate would provide an important safeguard.
- 5.4 **The NIHRC advises that further consideration is given to how to ensure the independence of the Commissioner. This could involve expressly stating that the Commissioner shall be independent, as in the Official Languages Act 2003. Alternatively, a balance can be struck by ensuring any government direction to the Commissioner takes into account the Commissioner's own advice, as is the case in Wales or by amending the Bill to ensure that Ministerial directions are reasonable, have a legitimate aim and are proportionate.**

6.0 Education Duties

Clause 78R - Duty on Department of Education

- 6.1 Clause 78R of the Bill places a new duty on "the Department of Education (so far as its powers extend) to encourage and facilitate the use and understanding of Ulster Scots in the education system".
- 6.2 The right to take part in cultural life is intrinsically linked to the right to education.⁵³ Accordingly, the NIHRC welcomes this new statutory duty.

⁵² Directorate General Human Rights and Rule of Law, 'Guide to good practice in respect of domestic remedies' (CoE, 2013), at 33.

⁵³ E/C.12/GC/21, 'UN Committee on Economic, Social and Cultural Rights General Comment No 21: Right of Everyone to Take Part in Cultural Life', 21 December 2009, at para 2.

- 6.3 However, it is unclear whether the duty applies to the Ulster Scots language alone, or whether it applies more broadly to the full mandate of the Commissioner. While the acquisition of language is key for national minorities to maintain their identity,⁵⁴ it is important that other aspects of cultural identity are not neglected.
- 6.4 **The NIHRC advises that the Bill clarifies the scope of the duty on the Department of Education and recommends that the duty is extended to the full mandate of the Commissioner, not only language.**
- 6.5 In Northern Ireland, responsibility for some aspects of education rest with the Department for Economy, for example, Higher and Further Education. Article 12 of the Framework Convention for the Protection of National Minorities and Part III of the European Charter for Regional or Minority Languages require that education should be interpreted broadly.
- 6.6 **The NIHRC recommends that the Department for Economy is subject to a similar duty, as set out in clause 78R, given its remit in the provision of Further and Higher Education.**

7.0 Public Authority

Clause 78S – Definition of public authority

- 7.1 As outlined above, the Commissioner is required to give advice and guidance to public authorities in Northern Ireland. The interpretation of a 'public authority' is defined in clause 78S(1) as "anybody or person listed in Schedule 3 to the Public Services Ombudsman Act (Northern Ireland) 2016".
- 7.2 The term 'public authority' has a wider meaning under section 6 of the Human Rights Act 1998 where it includes "a court or tribunal, and person certain of whose functions are functions of a public

⁵⁴ See Articles 7(1)(f)-7(1)(h), European Charter on Regional or Minority Rights 1992; Organisation for Security and Cooperation in Europe, 'The Hague Recommendations Regarding the Education Rights of National Minorities', 1 October 1996, at Recommendation 1.

nature".⁵⁵ A key distinction is that the Human Rights Act definition includes private organisations, when they are providing a public service or their service is paid for in whole or part by public money. The definition of a public authority within the Public Services Ombudsman Act does not extend to such scenarios. Additionally, the use of the term 'public services' within Article 10 of the European Charter for Regional and Minority Languages has been interpreted to include services delivered by third parties on behalf of public bodies.⁵⁶

7.3 The NIHRC advises that the interpretation of 'public authority' within clause 78S is too narrow and advises that the definition of 'public authorities' should be amended to reflect section 6 of the Human Rights Act 1998. In addition, a wider definition must be provided to ensure compliance with European Charter for Regional and Minority Languages reference within the Bill itself.

⁵⁵ Section 6, Human Rights Act 1998.

⁵⁶ Council of Europe, 'Explanatory Report to the European Charter for Regional or Minority Languages' (CoE, 1992), at para 102.

Appendix 1 – Right to Enjoy Culture

UN International Covenant on Civil and Political Rights

Article 27, UN ICCPR provides:

in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

See UN Human Rights Committee 'General Comment No 23: the Rights of Minorities'.⁵⁷

UN International Covenant on Economic, Social and Cultural Rights

Article 15, UN ICESCR provides:

1) The States Parties to the present Covenant recognize the right of everyone:

- a) To take part in cultural life;
- b) To enjoy the benefits of scientific progress and its applications;
- c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

⁵⁷ CCPR/C/21/Rev.1/Add.5, 'UN Human Rights Committee General Comment No 23: The Rights of Minorities', 8 April 1994.

3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

See Committee on Economic, Social and Cultural Rights, 'General Comment No.21: Right of everyone to take part in cultural life'.⁵⁸

⁵⁸ E/C.12/GC/21, 'UN ICESCR Committee General Comment No 21: Right of Everyone to Take Part in Cultural Life', 21 December 2009.

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